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IN THE

Supreme Court of the United States

October Term, 1957

No. 350

PASQUALE PALERMO,

Petitioner,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

October Term, 1957

No. 380

PASQUALE PALERMO,

Petitioner,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

Petitioner prays for a rehearing of this cause and in support thereof respectfully shows:

Statement of the Case

Petitioner, a longshoreman employed by a contracting stevedore, fell and sustained injury while walking on the port side of respondent's vessel toward his work place on the bow. He claimed that the port deck was grease-covered, unlighted and in darkness, but admitted that he knew these conditions in advance. There was evidence that the starboard deck was safe and equally convenient at the time, and that petitioner knew it. The trial court refused to

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PETITIONER'S BRIEF IN OPPOSITION TO MOTION TO RECALL AND AMEND THE JUDGMENT

Statement

Petitioner Palermo urges this Honorable Court to deny respondent's motion as being without merit in law and fact.

Argument

The so-called remaining question is one concerning excessiveness of the verdict, which was fully considered and properly decided adversely to respondent by the trial Judge. (See Opinion Denying Defendant's Post-Trial Motions, page 11a in defendant-appellant's appendix below.) In *Neese* v. *Southern Railway Company*, 350 U. S. 77, 76 S. Ct. 131, reversing 216 F. 2d 772, this Court held it was error for the Court of Appeals to reverse a district Judge who

denied a motion for a new trial where the action of the district Judge was not without support in the record. As the Court below would have to adhere to this decision on any issue of excessiveness, then unnecessary delay and undue harassment of petitioner would result from remanding on an issue that must necessarily be resolved in favor of petitioner.

The record below had been certified to this Court and the so-called remaining issue on excessiveness and whether the District Court had properly exercised his discretion "to determine whether the jury made proper allowance for contributory negligence" had been presented by respondent in its brief in opposition to the petition for a writ of certiorari herein. (See respondent's Statement of the Case, pages 2 to 4 in said brief.) The purported remaining questions were worded as one and differently in respondent's brief to the Court below than it is now presented in the brief in support of the instant motion, then stated as follows:

> "2. Did the Court have power to consider the motion to set aside the verdict and for a new trial on the ground of excessiveness; if so, should it have considered the jury's allowance for contributory negligence" (p. 4 of Brief and Appendix for defendant-appellant below).

For at least two additional factual reasons this specious question should not be the basis of remand and delay in the finality of judgment herein:

1. This Court in its *per curiam* opinion concisely answered this contention by respondent as follows:

> ". . . The jury was properly instructed that the petitioner's negligence, if any, was to be considered in

mitigation of damages under the rule applicable in actions for personal injuries arising from maritime torts."

2. The District Court's final judgment in the amount of $65,000.00, predicated on an opinion that the 45 year old plaintiff "was very seriously injured, and that the right upper extremity of his arm was practically completely disabled, and that at most he had the use of the fingers of his right hand to a very limited extent. He suffered extremely great pain and was subjected to a state of mind which might humiliate him throughout his life" (p. 12a of defendant-appellant's appendix below), was not contested during the trial where respondent did not call a doctor to rebut any of the medical testimony clearly demonstrating the permanent disability and petitioner's inability to ever return to manual work.

Respondent cites the case of *Cahill* v. *New York N. H. & H. R. Co.*, 351 U. S. 183 in support of its extreme request for what is tantamount to an untimely second petition for rehearing. There can be no comparison between the remaining issue in that case related to a serious question of evidence as to prior accidents at the situs, and the "remaining" issue herein on a question that had been considered by this Court, and is additionally without merit because of the clear and unequivocal rulings of this Court that excessiveness is not a matter for appellate review where the record supports the judgment and the trial Judge's decision to let it stand.

That this Court has the power to decide a question expressly left undecided by the Court of Appeals, is stated in *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, 31 S. Ct. 617, where after reversing the Court of Appeals on one question, the Court went on to decide the second question

expressly left undecided. Mr. Justice Harlan, speaking for the Court, said:

> "As the case is here upon certiorari to review the judgment of the Circuit Court of Appeals, this court has the entire record before it, with the power to review the action of that court, as well as direct such disposition of the case as that court might have done . . ." (p. 588 of 220 U. S.).
>
> See: *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504, 508, 71 S. Ct. 470, 472.

In the original petition herein it was requested that the Court reverse the Court below and "reinstate the original judgment of the district Court . . ." In petitioner's reply brief the prayer included "Summary reversal to the end of a final determination . . ." It must have been considered that the jury verdict of May 8, 1956 on the accident of February 16, 1955, had been unduly protracted as to finality of judgment to the prejudice of the petitioner, and that in the proper exercise of this Honorable Court's power, litigation must cease by the issuance of a mandate to the District Court. This was done and yet again respondent seeks to delay the entry of a final judgment by asking consideration of an issue that is without basis in law or fact.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the motion be denied or in the alternative that it be granted solely to summarily resolve any doubt that the remand to the District Court for the entry of a final judgment was predicated on the necessary and proper exercise of this Honorable Court's power and purpose to terminate needless litigation, particularly on a so-called issue that is without merit in law and fact.

Respectfully submitted,

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